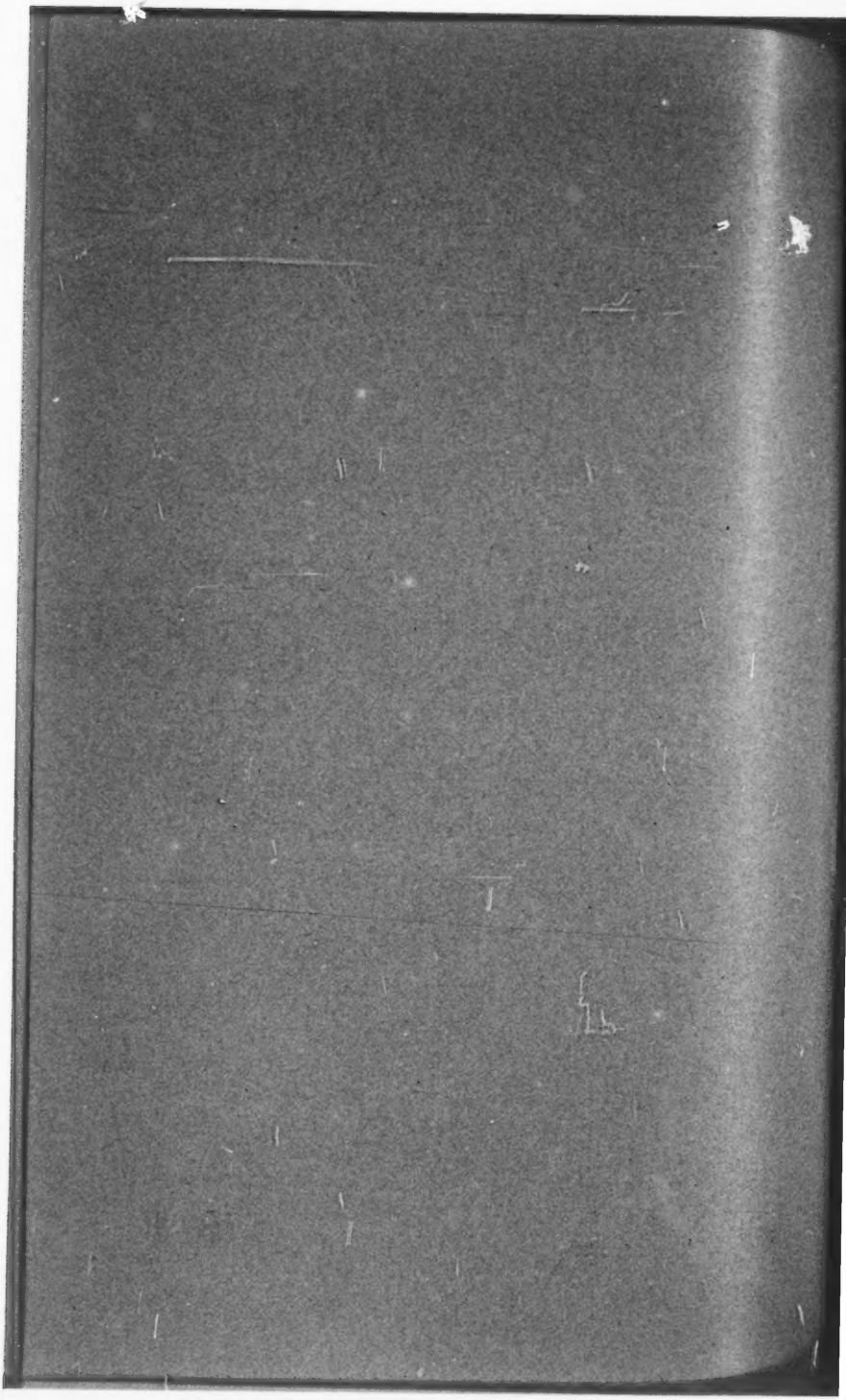

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 172.

DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR,

vs.

CAMDEN IRON WORKS, DEFENDANT IN ERROR.

Brief for the District of Columbia, Plaintiff in Error.

This is a writ of error to reverse the judgment of the Court of Appeals of the District of Columbia affirming the judgment of the Supreme Court of the District of Columbia in an action of *covenant* to recover $11,059.16, an alleged balance due the Camden Iron Works on a contract (Rec., p. 9) being the price of certain cast iron pipe delivered by it to the District during the years 1887 and 1888.

The declaration (Rec., p. 1) was of such equivocal character that there were filed to it, among others, inconsistent pleas, thus inviting a demurrer, viz., did not covenant, *non-assumpsit*, performance, non indebitatus, and afterwards by leave of the court, *non est factum*, set off, and the statute of limitations of three years, to which last plea there was a demurrer, which was sustained (Rec., p. 6).

The plea of set-off covered the claim for the penalties prescribed in the contract because of failure to perform its conditions, and to deliver the pipe within contract time and for the value of other pipe the District was obliged to purchase to supply the place of pipe not delivered (Rec., p. 4).

The case went to trial and resulted in a verdict in favor

of the plaintiff below for $11,049.43, with interest from February 28, 1888. A motion for new trial being overruled, judgment was entered (Rec., p. 7), whereupon the defendant took its appeal upon bills of exception to the Court of Appeals of the District of Columbia, where the judgment below was affirmed. 15 App. D. C. 198. And thereupon the present writ of error was sued out.

At the trial, the plaintiff below, having proved the signatures of William B. Webb, S. E. Wheatley, and William Ludlow to the contract sued on, and that they were Commissioners of the District of Columbia in 1887, was permitted to put the same in evidence. The first clause of this contract (Rec. p. 9) was as follows:

> "This contract made and concluded this twenty-ninth day of June, in the year one thousand eight hundred and eighty-seven, by and between the *District of Columbia*, of the first part, and the *Camden Iron Works*, by Walter Wood, its President, of the second part."

The final clause thereof was as follows:

> "In witness whereof the undersigned, William B. Webb, Samuel E. Wheatley, and William Ludlow, Commissioners of the District of Columbia, appointed under the act of Congress, entitled 'An act providing a permanent form of government for the District of Columbia,' approved June 11, 1878, and the party of the second part to these presents have hereunto set their hands and seals the day and year first above written.
>
> "WILLIAM B. WEBB, (L. S.)
> "S. E. WHEATLEY, (L. S.)
> "WILLIAM LUDLOW, (L. S.)
> "*Commissioners of the District of Columbia.*
> "WALTER WOOD,
> "*Pres't Camden Iron Works.*"
>
> (Corporate seal Camden Iron Works.)
>
> "Signed and sealed in the presence of—
> "E. H. DIEFFENBACH."

To the offer of said contract in evidence counsel for the defendant objected, upon the ground that the declaration was in covenant, and declared upon a sealed instrument, whereas said contract was not the covenant, but the simple contract of the District of Columbia; but said objection was overruled and an exception noted (Rec. p. 9).

The plaintiff then proved by William Tindall, Secretary to defendant's Board of Commissioners (Rec., p. 18), that the District of Columbia had a corporate seal; that it was not generally used until after the contract in this case was executed; but it was affixed to deeds conveying real estate of the District, and bonds and securities of the District, and in some cases to tax deeds issued by it.

By Alexander McKenzie, principal accounting clerk in the auditor's office of the defendant, the plaintiff proved (Rec., p. 18), that it delivered 1,025,943 pounds of iron pipe under the contract sued on, between November 18, 1887, and January 17, 1888; that 210,472 pounds of said pipe were received and accepted by the District on February 27, 1888; that the value of the said pipe delivered by the plaintiff to the defendant at contract rates was $16,335.87, on which there was paid in cash $5,291.71, and that the balance, $11,044.16, was offset by fines and penalties for failure to deliver the pipe on contract time.

The plaintiff was also permitted, over the defendant's objection, to prove that the contract sued on was executed by it June 29, 1887, and that at that time it had not been signed by the District Commissioners (Rec., p. 20); that William B. Webb, one of said Commissioners, had not signed it on August 4, 1887. The plaintiff's president, Walter Wood, testified that immediately upon receiving the contract, August 4, 1887, his company got ready to cast the iron pipe required by it, and manufactured a large quantity of it during August, 1887, but that, after the correspondence in regard to the fitness of Hoyt as an inspector, and the receipt of the letter of Capt. Symons, dated Septem-

ber 7, 1887 (Rec., p. 26), the plaintiff stopped work under said contract, and sold to other parties the pipe already manufactured. That between September 10 and 15, 1887, Col. Ludlow came to the plaintiff's office in Philadelphia, and they had a talk about Hoyt; that at this interview the witness told Col. Ludlow that his company would not resume work on the pipe contracted for, unless it was agreed that no penalties would be imposed for delay in delivering it; that Col. Ludlow replied that no injustice would be done, and this led the witness to believe that penalties for delays would be waived, otherwise the plaintiff would have done nothing under the contract; that Mr. Hoyt, the inspector, did not arrive until October 17 following, and work was at once begun, but Hoyt was not inspecting the pipe fairly; that out of a total of 2,726 lengths he rejected 704, of which only 169 did not come up to the specifications. The remaining 435 were put in stock, and sold to other customers at full contract rates.

That on November 30, 1887, when Capt. Symons, by letter (Rec., p. 32), requested that no more pipe be cast under the contract, there remained to be cast about 340,000 pounds, on which the plaintiff's profits at contract prices would have been about $1,300.

That after the plaintiff's letter of November 30, assenting to the cancelation of the contract, as to pipe not then manufactured, provided all pipe manufactured should be taken and paid for at contract rates without deductions, and Capt. Symons' reply thereto, directing the sending on of the pipe then cast and accepted by Hoyt, the value of the pipe actually shipped to the defendant at contract rates was $11,404.09. That after receiving Capt. Symons' letter the plaintiff made no particular haste to deliver the pipe which had been cast and inspected, and it was shipped as schooners could be conveniently chartered (Rec., p. 36).

That under date March 28, 1888, the plaintiff received from the auditor of the District a statement of account, and

a letter under date 30th of the same month, inclosing two checks, one for $2.369.29 and one for $2,922.42. This letter did not state whether the checks were in full (Rec., p. 36), but a little later the plaintiff received a statement of the account, which showed that fines and penalties had been imposed to an amount equal to the value of the pipe shipped after December 1, 1887; that witness protested against that way of settling the account, and made several trips to Washington in regard to the matter; that on one occasion he was referred to Col. Ludlow, who had ceased to be a Commissioner, and was on duty at Detroit, and witness went to Detroit to see him, but he declined to make any recommendation for the readjustment of the account. The witness on February 5, 1889, and November 10, 1892, wrote two letters to the Commissioners (Rec., p. 36).

The plaintiff also gave evidence by Christopher Miller (Rec., p. 39) one of its employees, that a great many of the pipes rejected by Hoyt were good, and were put back in stock. The plaintiff's shipping clerk, Fanning, testified that he knew Hoyt, and that it was next to impossible to make pipe to suit him. That witness got the Washington order August 5, 1887, and that it would have taken forty-five days to have filled it, if the entire force had been put to work on that one order. That many of the pipe rejected by Hoyt were fairly up to the specifications. That the plaintiff first received orders to go ahead with the manufacture of the pipe for the District August 5, 1887, and immediately went to work. About one-third of the entire order was cast in August and September, but the work was suspended and the pipe cast was sold to other customers. After it was determined to resume work, about the middle of September, the plaintiff could have resumed any day after the arrival of the inspector. He came October 17. The plaintiff quit manufacturing pipe for Washington December 1, 1887. That after the plaintiff received the letter of November 21, 1892 (Rec., p. 39), it procured, in accord-

ance with the suggestion of the Commissioners, a bill for its relief to be introduced in Congress, which was done on February 3, 1893; that the plaintiff assumed that the bill was a mere matter of routine, and would be referred to the Commissioners and its enactment recommended by them. After waiting a year, during which no action was taken by Congress, the plaintiff gave up all efforts to settle the account out of court.

For the defendant, Thomas W. Symons (Rec. p. 41), who was assistant to the Engineer Commissioner in 1887, and in charge of the water service, testified that there was a great deal of building going on in Washington in 1887, and a great need for the water pipe; that he visited the plaintiff's shops at Camden, N. J., during the time of the contract to see how the work was getting on, and to ascertain the real objection to Hoyt; that Hoyt explained to witness, in the presence of representatives of the plaintiff, why he rejected some of the pipe; that the reasons for delay in delivering the pipe, as far as he knew, appeared in the correspondence; that the settlement made was with the knowledge and approval of the witness and under his direction at the time it was made; that Colonel Ludlow, the then Engineer Commissioner, is now in Havana.

On cross-examination the witness further testified, in response to questions by the plaintiff's attorney, that he was assistant to Colonel Ludlow, the Engineer Commissioner, in 1887, and had charge of the details relating to the pipe castings under the contract offered in evidence; that he did not know, when he wrote the letter of July 9, that the contract had not been signed by the District Commissioners, and did not consider it material; that he considered it in accordance with the contract to charge against the plaintiff fines for the delay occasioned by the failure of Hoyt to arrive at the Millville foundry after he had been requested so to do; that when he requested the plaintiff, in reply to their letter of November, 30, assenting to a cancelation of the

contract so far as it related to pipes not cast, that all pipes cast should be taken and paid for at contract rates, and to send on and deliver pipe then cast, he did not intend to confiscate by way of fines all pipes that might be sent thereafter; that he did not at that time give any consideration to the question of fines and penalties, which was a matter to be adjusted after the contract was finished; that his intentions related principally to getting the pipe for the benefit of the city; that when he stated in his letter of November 30 that the only question involved was the one of available funds he did not have "up his sleeve" the question about fines which developed later and after the pipe were received; that he did not consider that the contractors had any reasonable or proper excuse for failure to deliver the pipe on time; that, in his opinion, a reasonable excuse for the failure would be that the foundry burned down or the pits burned up.

On redirect examination, in reponse to questions propounded by the counsel for the defendant, the witness further testified that he had heard the testimony of the witness Fanning about the rejection of pipes by Inspector Hoyt, and that, in his opinion, the proportion of pipes rejected by Hoyt was not very large; that there was very little difference in the method of casting commercial pipe, though nearly all water works have a little different drawing on the bell head, though very little; that the witness had examined some of the pipes rejected by Hoyt and found that they were eccentric and some of them were crooked on the small end, but most of his rejections were due to the eccentricities of the pipes (Rec., p. 43).

On further cross-examination, the witness testified that he went to Millville foundry, on the occasion of the visit he had mentioned, in the morning and back again at night; that he was not quite sure he went into the Millville office and did not remember whether or not he had seen the president of the company, Mr. Wood. He could not remember

whether or not this visit was before or after the first of November, though he thought it was shortly after he ordered the work on the Washington contract; that he did not remember whether or not any of the pipes had then been shipped to the District; that the pipes rejected by Hoyt as being eccentric were at the works, though he did not recollect whether they were on skids or in a pile; that he determined about the eccentricities of pipes by rolling them; that he saw them rolled or possibly rolled them himself; that he did not remember how many pipes he so rejected and could not say whether or not they were not the pipe afterwards rejected and broken up by Mr. Miller, the inspector of the plaintiff company; that he did not remember having notified any official of the plaintiff company that he intended to make this visit. On being recalled, the witness further testified that a lot of pipes were purchased by the District outside of the contract, though he could not remember how many.

Henry F. Hayden, for the defendant, testified (Rec. p. 43) that the said plaintiff was awarded the contract given in evidence, it being the lowest and only bidder; that many people in the District were suffering for water, and the failure of the plaintiff to deliver the pipe contracted for was a matter of great annoyance and inconvenience to the people of the District, as well as a source of great expense to them; that so decided was the necessity for the pipe contracted for that it was deemed proper to purchase a quantity of such pipe wherever it could be found in open market and charge the excess of cost over the contract price to the plaintiff; that this was done, and pipe was purchased from Jackson and Woodin, of Berwick, Pennsylvania, and from the Sayre Pipe Foundry Company, of Sayre, Pennsylvania, and the plaintiff was duly informed of this action and it finally concluded to go on with the making of the pipe and to accept Mr. Hoyt as inspector, and they did make the pipe under his direction and it was delivered.

ASSIGNMENT OF ERRORS.

The Court of Appeals erred in sustaining the action of the trial court—

1. In sustaining the demurrer to the plea of the statute of limitations (Rec., p. 6) and in admitting the contract in evidence (Rec., p. 9), and in refusing the first and second prayers offered by the defendant below (Rec., p. 53), thus holding that the contract sued upon was a specialty, whereas it was the simple contract of the District of Columbia.

2. In granting the first, second and third prayers offered by the plaintiff below (Rec., p. 52); these prayers were based on a modification of the contract, but the declaration did not count on any modification of the original contract; the court thus held that the action of covenant could be maintained on a contract under seal, modified by parol.

3. In refusing to grant the fourth prayer offered in behalf of the District of Columbia (Rec., p. 53) to instruct the jury that the District had the right to charge and deduct the penalties in the contract, if the failure to deliver the pipe at the times and in the quantities contracted for hindered and delayed the District in extending the public water service in 1887.

4. In refusing to grant the fifth prayer (Rec., p. 53) offered in behalf of the District and in holding that the plaintiff was entitled to interest on its claim.

5. In refusing to grant the sixth and seventh prayers (Rec., p. 53) offered in behalf of the District and in allowing oral evidence to be offered by the plaintiff below, without any notice to the District and without any allegation of fraud or mistake in the contract, whereby the date of the execution of the contract was changed from the date it purported to be "made and concluded" and from its date as alleged in the declaration.

POINTS AND AUTHORITIES.

I.

The contract sued on was not a specialty; it was only the simple contract of the District.

The declaration was in *covenant*, and it alleged that by certain articles of agreement, bearing date the 29th day of June, A. D. 1887, between the plaintiff corporation, the Camden Iron Works, acting through and by Walter Wood, its president, and sealed with its corporate seal, of the one part, and the said District of Columbia, acting through and by William B. Webb, Samuel E. Wheatley and William Ludlow, its Commissioners, duly authorized in that behalf, and sealed with their seals, of the other part, it was covenanted, promised and agreed upon as follows: First, the Camden Iron Works did covenant, promise and agree that it would furnish certain cast-iron pipe; and second, that the District of Columbia, acting as aforesaid, by said articles of agreement, did covenant, promise and agree to pay for said pipe certain prices, etc.; and the plaintiff says that it always from the time of making said agreement did well and truly do observe, perform and fulfill all and everything in said articles of agreement contained on its part to be done, observed, performed and fulfilled, except in so far as it was prevented or discharged from so doing by the District of Columbia, and that in the performance of said articles of agreement did furnish a large quantity of pipe, which was received by the defendant, etc., etc.

This contract, however, contains none of the apt words of a "covenant"; that word does not appear in the "articles of agreement." There was absolutely no necessity for or propriety in this agreement being a specialty. It is assumed by the learned Court of Appeals that the municipality, the District of Columbia, is like an ordinary municipality in

the matter of contracting. It declares in its opinion (Rec., p. 62) that the—

> "Commissioners are the chief executive officers of the municipal government and contracts executed by them, under their hands and seals, intended as and manifestly official acts, have the force and effect of deeds or sealed instruments, according to their import, and bind the corporation and not the individual Commissioners."

It is unnecessary to question this proposition as applied to the case of the ordinary municipality; but is the District of Columbia in this category?

We submit it is not. It does not follow that because the District had the right to adopt a seal, that therefore its then Commissioners had the right to execute, under the seal, the contract sued on in this case. The Commissioners, doubtless, had the right to execute deeds for the District under the seal of the municipality, for this is the only way such instruments can be legally executed, but here they were making an ordinary contract for the purchase of merchandise. The Commissioners were not the municipality; they had only such authority in the premises as was conferred upon them by Congress.

We do not contend that the Commissioners who signed this contract were personally liable thereon; we admit the contract bound the District, but we insist that it was and could only be bound by simple contract, and not by specialty contract. If the Commissioners had affixed to this contract the seal of the municipality, it would not have become a specialty, because their act in this respect would have been *ultra vires;* they were not authorized to make that kind of a contract.

In Dist. of Col. *vs.* Bailey, 171 U. S. 161, this honorable court, in considering the power of the Commissioners to make a contract to submit to an award, reviewed their authority to make contracts. The court examined the

statutes "from which alone the powers of the Commissioners of the District are derived." The act of June 20, 1874 (18 Stat. 116), vested in the commission there provided, the power and authority of the then governor and board of public works of the District, except as therein limited, and provided that—

> "said commission, in the exercise of such power or authority, shall make no contract, nor incur any obligation, other than *such contracts* and obligations *as may be necessary* to the faithful administration of the valid laws enacted for the government of said District," etc.

The act of June 11, 1878 (20 Stat. 102), providing a permanent form of government for the District, vested the Commissioners with the powers of the Commissioners appointed under the act of June 20, 1874, etc., and declared that they—

> "shall make no contract nor incur any obligation other than such contracts and obligations as hereinafter provided for and shall be approved by Congress."

Section 37 of the act of February 21, 1871 (16 Stat. 427), relating to the powers of the board of public works, declared that—

> "All contracts made by the said board of public works shall be in writing, and shall be signed by the parties making the same, and a copy thereof shall be filed in the office of the secretary of the District, and said board shall have no power to make contracts to bind said District to the payment of any sums of money except in pursuance of appropriations made by law, and not until such appropriations shall have been made."

This court held that this section was applicable to the present Commissioners, and cited the 15th section of the act

of February 21, 1871, by which it was provided that the legislative assembly should not—

> "authorize the payment of any claim or part thereof, hereafter created against the District under any contract or agreement made, without express authority of law, and all such unauthorized agreements or contracts shall be null and void."

The court also referred to the fact that section 13 of the Act of June 1, 1878, embodied the 2d section of the joint resolution of March 14, 1876 (19 Stat. 211), which made it a misdemeanor for any officer or person to increase or aid or abet in increasing the total indebtedness of the District; and the court said:

> "But the mere fact that the District is a municipal corporation is not decisive of the question whether or not the Commissioners of the District had power to make a contract to submit to an award, for, as we have seen, it is not the mere existence of municipal corporate being from which the power to make a submission to arbitration is deduced, but that the municipal corporation by which such an agreement is entered into has power to contract, to settle and adjust debts; in other words, all the general attributes which normally attach to and result from municipal corporate existence. Recurring to the statutes relating to the Commissioners of the District of Columbia, it is clear from their face that these officers are without general power to contract debts, or to adjust and pay the same; that, on the contrary, the statutes expressly deprive them of such power, and limit the scope of their authority to the mere execution of contracts previously sanctioned by Congress or which they are authorized to make by express statutory authority. The necessary operation of these provisions of the statutes is to cause the District Commissioners to be merely administrative officers with ministerial powers only. *The sum of the municipal powers of the District of Columbia are neither vested in nor exercised*

> *by the District Commissioners. They are, on the contrary, vested in the Congress of the United States, acting pro hac vice as the legislative body of the District, and the Commissioners of the District discharge the functions of administrative officials.* There is no authority for holding that a mere administrative officer of a municipal corporation, simply because of the absence of a statutory inhibition, has the power, without the consent of the corporation speaking through its municipal legislative body, to bind a corporation by a common law submission. . . . (178). Whilst the fundamental want of power in the District Commissioners to agree to a common law submission is decisive, there is another view which is equally so. By the express terms of the statute the Commissioners are forbidden to enter into any contract binding the District for the payment of any sum of money in excess of $100, unless the same is reduced to writing and is recorded in a book to be kept for that purpose, and signed by all the Commissioners, the statute declaring, in express terms, that no contract shall be valid unless recorded as aforesaid. This mandatory provision of the statute clearly makes the form in in which a contract is embodied of the essence of the contract. In other words, by virtue of the restrictions and inhibitions of the statute a contract calling for an expenditure in excess of $100 can not take effect unless made in the form stated. The form, therefore, becomes a matter of fundamental right, and illustrates the application of the maxim *forma dat esse rei.*"

If the Commissioners may not increase the indebtedness of the District, by what process of reasoning can it be claimed that they may enlarge the legal liability of the District by *unnecessarily* extending that liability from three years to twelve years? A contract *under seal* was impliedly prohibited by the act of June 20, 1874, because it was not such a contract as was "*necessary* to the faithful administration of the valid laws."

Congress authorized and directed the Commissioners to

make a contract in writing—not a contract in writing under seal. Where can be found any authority for Captain Symons or Colonel Ludlow to waive the provisions of the contract of the Camden Iron Works with the District of Columbia? Where can be found their authority to make a new contract with the Camden Iron Works, especially to make a new contract under seal?

It will be observed that the declaration (Rec., p. 1), does not aver that the contract was sealed by the Distr ct or that it was under its seal; the averment is that the contract was sealed with the seals of the Commissioners; under such an averment a sealed contract of the District was not admissible in evidence. The plaintiff below was charged in law with knowledge and notice that the powers of the Commissioners were limited and that they could not make a specialty contract for the District. It is quite apparent, too, that such a specialty on the part of the District was not within the contemplation of the parties, for the contract is thus executed formally and deliberately under its seal by the Camden Iron Works and it is not thus executed by the District.

But it is said that the private seals of the Commissioners are attached to the contract which purports to be the contract of the District, and therefore it becomes the specialty contract of the municipality.

We deny that this would be the effect even if the contract was that of a private corporation; for being the only organ by which a body corporate can obligate itself by deed, a contract on behalf of the corporation by an agent, who affixes his private seal, has the effect of binding the corporation only by *simple contract.*

Bank *vs.* Guttschlick, 14 Pet. 29.
Tiedeman Munic. Corp., 165.
1 Dill. Munic. Corp., Sec. 452.
21 Am. & Eng. Encyc. Law, 910, and cases.
Ibid (2d Ed.), 1040 and 1041.

The deed of a corporation is invalid, if executed in the name and under the seal of its officers.

The use of a seal by the corporation is only necessary where its use would be required by an individual.

4 Am. & Eng. Encyc., 241 and cases; 242 and cases.

A corporation was anciently held to be able to act only by its seal. That idea has been abandoned, but it may still use the seal in deference to the ancient rule, as a means of evidencing its assent to a simple contract. And the use of a seal, where none is required, does not raise the contract to the dignity of a specialty or prevent assumpsit instead of covenant being maintained thereon.

Thomson on Corporations, Sec. 5053.
Bank *vs.* Railroad Co., 5 S. C. 156.
Levering *vs.* Mayor, 7 Hump. (Tenn.) 552.
Clark *vs.* Read, 12 App. D. C. 343.

Where duly appointed officers or agents, acting within the scope of their authority, execute an instrument on behalf of a corporation, signing their own names and affixing their own seals, such seals are merely *nugatory*, and the instrument is to be regarded as a simple contract; and, if otherwise valid, binding on the corporation as such.

Regents of University *vs.* Detroit, etc., 12 Mich. 138.
Blanchard *vs.* Blackstone, 102 Mass. 343.
Burrill *vs.* Boston, 2 Cliff. (C. C.) 590.

An instrument purporting to be the deed of a corporation and executed in its name by its president, with the word "seal" at the end of the signature, is not effective as the deed of the corporation, either at common law or under Sec. 685 of the Code. Such deed is only the *personal act of the president*, and is not admissible in evidence to prove a conveyance by the corporation.

Caldwell *vs.* Morgantown Co., 121 N. Car. 339.

A deed purporting to be the deed of a corporation authorized by law to have and use a common seal, which is not sealed with the corporate seal, is *void.*

Danville Seminary *vs.* Mott, 136 Ill. 289.

> "The instrument bears not the corporate seal, consequently, at common law, had the parties been reversed, no action for *covenant broken* could have been maintained against these plaintiffs."
>
> Orphan Asylum *vs.* Johnson, 43 Me. at 184.

> "It seems that although because of the absence of the corporate seal the corporation might not have been liable in a technical action of *covenant*, it was liable in an action of *assumpsit* for use and occupation."
>
> Whitford *vs.* Laidler, 94 N. Y. 145.

A corporation can only execute a formal bond with its *corporate seal*, countersigned by an officer entitled to affix its seal.

Mo. Land Co. *vs.* Jeffries, 40 Mo. App. 360.

An agent or attorney of a corporation, in executing a deed in its name, must, in order to make it the act and deed of the corporation, affix thereto the *corporate seal.*

Savings Bank *vs.* Davis, 8 Conn. 181.

In strictness a deed of conveyance by a corporation must be executed not only by using the corporate name in the body of the deed, but it must be *sealed with the corporate seal.* From this it follows that a deed describing the grantor as a corporation, but which is executed by the president thereof, in his own name, and under his own seal, and describing him as president, will not pass title from the corporation; and unless the seal of the corporation is affixed to the instrument, it will not support a common law action of

covenant, although sealed with the private seal of the agent of the corporation executing it; and it has been held, where the deed was thus executed, that, although the corporation may have authorized the committee to contract, and may therefore be liable in *some form of action*, yet *covenant* is not the proper remedy.

Thompson on Law of Corp., Par. 5080 and cases cited.

In the case of Randall *vs.* Van Vechten et al., reported in 19 Johns. Rep. 60, it was held that—

> "Where the defendants, describing themselves as a committee of the corporation of the city of Albany, entered into a written contract with the plaintiff, under their respective hands and seals, for a survey of the city, &c., and the corporation had recognized their authority to make the contract, that the defendants were not liable to the plaintiff in their individual capacities, but that an action of *assumpsit* would lie against the corporation, for, the contract not being under their *corporate seal*, *covenant* would not lie against them; and it makes no difference, in regard to a corporation, whether the agent is appointed under seal or not, or whether he puts his own seal to the contract he makes in their behalf."

And this court approves the doctrine laid down in the foregoing case in the following language:

> "Nor have we any doubt but that the action well lies against the bank, for, although the agreement is under seal, it is not the seal of the corporation, but that of the president and cashier. It was decided in the case of Randall *vs.* Van Vechten, 19 Johns. Rep. 60, that *covenant* would not lie against a corporation on a contract not under their *corporate seal*, but that an action of assumpsit would lie; and that it makes no difference, in regard to a corporation, whether the agent is appointed under seal or not, or whether he puts his own seal to a contract which he makes in their behalf, the doctrine of merger not applying to

such a case. This doctrine we approve, and it is decisive of the objection."

Bank of Metropolis *vs.* Guttschlick, 14 Peters, 29.

"Another objection," says this court, "is, that as the agreement of 1807 is sealed, and is connected by reference with the prior agreement, they are to be construed as one sealed instrument, and *assumpsit* will not lie upon an instrument under seal. The foundation of this objection utterly fails, for the agreement is not under the *seal of the corporation*, but under the *seals of the committee*."

Bank of Columbia *vs.* Patterson's Admr., 7 Cranch (U. S.) 299.

The private seals of a committee, professing to act for a corporation, are not the seals of the corporation; and although the corporation may have authorized the committee to contract and, may therefore, be liable in *some form of action*, yet *covenant* is not the proper remedy. An action of covenant can only be maintained against a person who has executed a deed *under seal*.

Mitchell *vs.* President, etc., Land Co., 4 Fla. 200.

To bind a corporation by specialty, it is necessary that its corporate seal should be affixed to the instrument—the private seal of an agent, fully authorized to enter into a contract on the part of the corporation, would not have that effect; and so an action of *covenant* will not lie against the State upon a contract entered into by her agents and sealed with their private seals.

State *vs.* Allis, 18 Ark. 269.

The Cases Relied on by the Defendant in Error are to be Distinguished from the Case at Bar.

The case of Jacksonville, &c., Railway *vs.* Hooper, 160 U. S. 14, bears no resemblence to the case at bar. There the

lease was *signed in the name of the corporation* by its president, with a seal attached. The original lease was not offered in evidence; a certified copy and the duplicate lease were admitted in evidence. The court said (p. 518):

> "*But in the absence of evidence* to the contrary the scroll or rectangle containing the word "seal" will be deemed to be the proper and common seal of the company. A seal is not necessarily of any particular form or figure. . . . Whether an instrument is under seal or not is a question for the court upon inspection; whether a mark or character shall be held to be a seal depends upon the intention of the executant, as shown by the paper. The defendant did not produce the original in order that it might be compared in the particular objected to with the copy and duplicate offered. The defendant's attorney, Mr. Buckman, was called, and testified that he was one of the attesting witnesses to the instrument offered, and that he, as a notary public, took the acknowledgement thereto of Alexander Wallace; that he executed the same for and in behalf of the company, and that the said lease was the act and deed of the defendant company for the uses and purposes therein expressed. Whether, therefore, the instrument put in evidence was merely a copy, in which event it would not be expected that a wax or stamped seal of the company would appear upon it, but merely a scroll, representing the original seal, or whether the so-called copy was really the original paper, as certified by one of defendant's witnesses, would not, in our opinion, be material. The presumption would be, if the paper were a copy, that the original was duly sealed, or, if it were the original, that the scroll was adopted and used by the company as its seal, for the purpose of executing the contract in question."

The cases relied on by the defendant in error concerning the adoption and use of a seal have no relevancy to such a limited municipal corporation as the District of Columbia; moreover, they relate to private corporations and individuals, and sovereign States.

In Sheetz *vs.* Selden, 2 Wall. 177, the deed was executed by the Governor and auditor of Indiana and *bore the seal of the State.* The expression in the opinion referred to by the trial court (Rec., p. 45) does not relate to the question of whether the State would be bound in *covenant* under such an execution, but whether the contract is that of the individuals signing or of the State. This is made plain from the cases cited by Justice Field in the opinion. 1 Cranch, 345; 1 Greenleaf, 231; 15 Cal. 456. It can not be claimed that the Supreme Court of California held otherwise, for in Richardson *vs.* Scott River Co., 22 Cal. 150, it said:

> "A conveyance of real property by a corporation must be under its *corporate seal.* It may alter its seal at pleasure, and may adopt as its own the private seal of an individual, but in the latter case the seal adopted must be used as that of the corporation. If to a deed, purporting to be that of a corporation, a seal be affixed as that of the *individual agent who signs it,* such seal can not be treated as that of the corporation."

II.

Covenant Cannot Be Maintained on a Contract Under Seal Modified by Parol.

The demurrer to the defendant's plea of the statute of limitations reached back through the whole record, and raised the question whether the declaration was good.

Clearweather *vs.* Meredith, 1 Wall. 25.

The averment of the declaration was (Rec. p. 2):

> "And the plaintiff corporation in fact says that it always from the time of making said agreement did well and truly do, observe, perform and fulfill all and everything in said articles of agreement contained on its part to be done, observed, performed and fulfilled, *except in so far as it was prevented or discharged from so doing by the defendant,* and that in the performance of said articles of agreement it did furnish and deliver to the defendant the pipe," etc.

It will be observed the plaintiff does not aver performance of the alleged contract, but sets up a modification thereof and a performance of the modified contract. Covenant can not be maintained on a contract under seal, the material part of which is subsequently varied by parol agreement. The remedy is on the substituted agreement.

McVoy *vs.* Wheeler, 6 Port. Ala., 201.
Raymond *vs.* Fisher, 6 Mo., 29.
Vicary *vs.* Moore, 2 Watts., 451.
Ellmaker *vs.* Franklin Ins. Co., 6 W & S., 443.
Heard *vs.* Wadham, 1 East., 630.
Littler *vs.* Holland, 3 T. R. 590.

Where the defendants covenated to pay for work that should be done with their written assent, if such written assent be dispensed with by parol, covenant will not lie. *To bring down a covenant to parol in the declaration is to defeat the action.*

Lehigh Coal Co. *vs.* Harlan, 27 Penna. St. 429.

If a person enters into a bond for the performance of certain matters and afterwards a parol agreement is made between the parties, varying the time of performance, an action cannot be maintained upon the bond for the penalty; but the plaintiff must seek his remedy upon the agreement enlarging the time for performance.

Ford *vs.* Campbell, 11 N. J. L. 387.
Jewell *vs.* Schroeppel, 4 Cow. 564.
Carrier *vs.* Dilworth, 59 Penna. St. 406.

An action will not lie on a contract not performed in time, but recovery may be on *quantum meruit.*

Slater *vs.* Emerson, 14 How. 239.
Ingle *vs.* Jones, 2 Wall. 1.
Dermott *vs.* Jones, 23 How. 223.

Where it is necessary on the part of the plaintiff to aver performance, it must be set forth with such certainty as to enable the court to judge whether the intent of the covenant has been fulfilled. There was no sufficient averment here.

Thomas *vs.* Van Ness, 4 Wend. 549.
1 Chitty Pleading, 325.

An allegation of an original contract does not let in evidence of its modification.

Lainitz *vs.* King, 93 Mo. 513.
Fallon *vs.* Lawler, 102 N. Y. 228.
Henning *vs.* U. S. Ins. Co., 47 Mo. 425.
Pharr *vs.* Bachelor, 3 Ala. 237.
Buchanan *vs.* Beck, 15 Ore. 563.
Salter *vs.* Ham, 31 N. Y. 321.

A declaration on an express contract, alleging performance, does not let in evidence of an excuse for non-performance.

Colt *vs.* Miller, 64 Mass. 49.
Palmer *vs.* Sawyer, 114 Mass. 1.
Purdue *vs.* Noffsinger, 15 E. D. Smith, 386.
Bernard *vs.* Wash. Life Ins. Co., 40 Iowa, 442.
Fauble *vs.* Davis, 48 Iowa, 462.

Nor under such declaration can excuse be shown in rebuttal, where plaintiff's non-performance is set up as a defense as in this case.

Iseman *vs.* Hawkeye, etc., 74 Iowa, 11.
Boon *vs.* State Ins. Co., 37 Minn. 426.
Potts *vs.* Land Co., 47 N. J. L. 476.

As plaintiff must allege and prove performance, a general denial lets in evidence of breach.

Coverly *vs.* McOwen, 123 Mass. 574.

There were two material changes in the contract as claimed by the plaintiff; and without these changes the plaintiff "would not have done anything further under the contract" (Rec., p. 35), viz.: First, that no penalties whatever should be imposed; second, that the time for performance should be indefinitely extended. Phillips Const. Co. *vs.* Seymour et al., 91 U. S. 646, does not rule this question, for in that case there was no new contract, and this court held explicitly there could be no recovery for work done under the parol agreement in connection with the contract.

III.

The defendant's first prayer (Rec., p. 52) is based on the fact that there was a modification of the contract with reference to the time of delivery of the pipe contracted for. The plaintiff having failed to declare on the modification of said contract, this prayer was inapplicable to the case and should have been refused.

IV.

The plaintiff's second and third prayers are in the same category with its first, and should have been refused for the same reasons. The third prayer assumed that the plaintiff would not have delivered the pipe to the defendant except upon the modification of the contract. This question should have been left to the jury to find as a matter of fact.

V.

The jury should have been told that there could be no recovery against the defendant in this action, based upon the contract of June 29, 1887. No pipe was delivered within the contract term. If there could be any recovery on said contract, it could only be for pipe delivered within the 136 days, the contract time, the action being based on the special contract, and not otherwise.

VI.

The jury should have been instructed that the plaintiff was not entitled to recover in this action the price of iron pipe delivered to the defendant after November 10, 1887, because, that being the end of the contract time, any pipe that was delivered after that time could not have been the subject of recovery under the special contract declared on.

VII.

The court having admitted in evidence the contract declared on, the jury should have been told that upon the failure of the plaintiff to deliver the iron pipe therein mentioned at the times, and in the quantities specified, the defendant had the right to charge against the price it had agreed to pay the plaintiff for said pipe, as liquidated damages, the penalties provided for in the contract.

Emack *vs.* Campbell, 27 Wash. Law Rep. 214.

VIII.

The Plaintiff was Guilty of Laches, and was Not Entitled to Interest on its Demand.

The plaintiff having unreasonably delayed to bring its suit, the jury should have been instructed that it was not entitled to interest on its claim prior to the institution of the suit, if it was entitled to recovery at all. The plaintiff acquiesced in the settlement of the account, abandoned its claim against the defendant, and appealed to Congress for relief (Rec. p. 39); it should not thus be allowed to secure a continuing interest-bearing investment. The contract did not stipulate for interest. Congress has not declared that any interest shall be chargeable on District contracts, except that judgments on such contracts shall bear 4 per cent. interest.

At common law interest was not allowed; it is the creature of statute alone. A municipal corporation is created for public purposes and with limited powers; and it has been held that where it is not named in the act regulating interest, it is not liable for interest.

City of Pekin *vs.* Reynolds, 31 Ill. 529.

It is never allowed when the delay is the result of the mere failure of the creditor to press the collection of his claim.

Adams Exp. Co. *vs.* Milton, 11 Bush. 49.

But where interest is recoverable, not as part of the contract, but by way of damages, if the plaintiff has been guilty of laches in unreasonably delaying the prosecution of his claim, it may be properly withheld.

Redfield *vs.* Iron Co., 120 U. S. at 176.
U. S. *vs.* Sanborn, 135 U. S. 271.
Redfield *vs.* Bartels, 139 U. S. 694.

IX.

The Defendant in Error was not Entitled to Prove that the Contract Sued on was Executed at a Time Different From the Date Thereof Without Notice or Allegation Thereof in the Pleadings.

The declaration alleged that

> "Whereas by certain articles of agreement, *bearing date* the 29th of June, A. D. 1887, between the plaintiff corporation, acting through and by Walter Wood, its president, and sealed with its corporate seal of the one part, and the said District of Columbia, acting through and by William B. Webb, Samuel E. Wheatley and William Ludlow, its Commissioners, duly authorized in that behalf and sealed with their seals, of the other part, it was covenanted, promised and agreed upon as follows:"

The contract offered in evidence read: "This contract made and *concluded* this 29th day of June, 1887," etc.

The jury should have been instructed that the plaintiff was not entitled to show that the contract was executed on any other day than that named therein.

X.

The jury should have been instructed that under the contract given in evidence by the plaintiff the time within which the iron pipe specified therein was to be delivered was to be computed from the date of the execution of that contract as the same appeared upon its face.

In the "general conditions" of the contract was the provision (Rec. p. 15) that:

> "All work must be commenced within.....days, and completed within 136 days after the date of the execution of the contract; if not so completed, the pay of all inspectors employed on the work after the time fixed for its completion will be charged against and deducted from any money that may be due or become due the contractor, as well also the sum of ten dollars ($10.00) per diem for the same period, estimated as liquidated and fixed damages to the District, arising from failure to complete the work at the time specified, time of completion of the contract being an essential element and consideration.',

The court below held that the phrase, "after the date of the execution of the contract," did not refer to its date, but to the time when it was finally signed by all of the Commissioners, and that time was not of the essence of the contract.

> "Ordinarily," says Prof. Greenleaf, 2 Ev., Sec. 14, "in stating an instrument or other matter in pleading it should be set forth not according to its *terms* or its *form*, but according to its *effect in law*, for it is under its latter aspect that it is ultimately to be considered."

Again, at section 14, the author says:

> "On the other hand, it will not always suffice to adhere to the *literal terms* of the instrument in setting it forth in the declaration, for sometimes the true interpretation of the instrument itself may lead to a result totally different from the intendment of law upon the face of the declaration."

The plaintiff should have declared on the contract according to its legal effect, in order to entitle it to the benefit of showing that it was executed on a day other than that which the contract itself declared it was "made and concluded," or made proper averments in the declaration.

The date of a writing is that part which purports to specify the time when it was executed.

8 Am. & Eng. Encyc. (2d Ed.), 727.

Where time or place or any other circumstance is material, the plaintiff can not vary from his previous statement of it.

Chitty Plead. 648, 538, 644.

Without any notice to the defendant, by the pleading, or otherwise, and without any allegation of fraud or mistake, the plaintiff was allowed to offer evidence fixing the date of the execution of the contract different from the time it professed to be executed.

When the parties to a written agreement have made the date of the instrument a material part of the contract, as when the time of performance is fixed with reference to it, oral evidence is not admissible to vary or change it.

Joseph *vs.* Bigelow, 4 Cush. 82.
Huston *vs.* Young, 33 Me. 85.
Story Prom. Notes, (6 Ed.), Sec. 85.

The penalties and liquidated damages were very properly inserted in such a contract as the one in suit. The pipe, as

the plaintiff well knew, was intended for water-main service; and the uncontradicted testimony was (Rec. p. 42)—

> "That a great deal of building was going on in the District in 1887, and great need for the pipe called for under that contract—"

And (Rec. p. 43)—

> "That many people in the District were suffering for water, and the failure of the plaintiff to deliver the pipe contracted for was a matter of great annoyance and inconvenience to the people of the District, as well as a source of great expense to them, that so decided was the necessity for the pipe contracted for that it was deemed proper to purchase a quantity of such pipe wherever it could be found in open market and charge the excess of cost over the contract price to the plaintiff."

The plaintiff on its part, probably having a better market elsewhere (Rec. p. 36)—

> "Made no particular haste to deliver the pipe which had been cast and inspected and it was shipped as schooners could be conveniently chartered."

The admission of this oral testimony entirely *destroyed the provisions of the contract respecting penalties.* No notice of any such purpose was anywhere or in any way given, so that the District might be prepared to meet it; and when the case was tried (Rec., p. 41), Col. Ludlow, the Engineer Commissioner during the contract period, was absent in Havana.

It is respectfully submitted that there is error in the record, and that the judgment of the court below should be here reversed.

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